No. 2740

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

In the Matter of the Contempt of the INDEPENDENT PUBLISHING COMPANY, a corporation, and Its Manager and Editor, WILL A. CAMPBELL,

Plaintiffs in Error and Respondents.

BRIEF OF PLAINTIFFS IN ERROR.

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On the 29th of November, 1915, the United States District Attorney for the District of Montana filed in the United States District Court at Helena, Montana, an information against the Independent Publishing Company, a corporation, and Will A. Campbell, its Manager, charging contempt. (Tr. p. 2).

The Independent Publishing Company published

a daily paper at Helena, Montana, known as "The Helena Independent", and in its issue of 27th of November, 1915, it contained a news article regarding one Mr. Poe, who was on trial then in the United States District Court on a felony charge. The article appears at pages 4, 5, 6 and 7 of the transcript. Pursuant to a citation, which was issued, directing the respondents to show cause, they filed an answer. (Tr. pp. 11 and 12).

In this answer it is admitted that the article was published, and that it was not based on facts adduced at the trial. It is alleged that Mr. Campbell, as editor and manager, exercised reasonable care in excluding from the paper anything that would tend to interfere with the due administration of justice, and it is alleged that he exercised reasonable care and diligence in the employment of competent and careful reporters. It is then stated that Mr. Campbell left the office of the company at the usual hour, leaving a competent person in charge; that the article in question was written by W. H. Perkins, one of the reporters on the paper, and that the article before being published was not submitted for editorial supervision, as should have been done; that Mr. Perkins received the data for the article from a reliable source, and that he wrote and published the article in good faith, without intending to interfere with the administration of justice; that Mr. Campbell or no officer of the corporation knew of the article or its contents until after its publication, and regret was expressed for its publication, with

an assurance that in the future such care would be exercised as would render impossible recurrence of such an event. How the article came to be written and the source of the information, and how it came to be published without supervision is shown by the affidavit of Mr. Perkins, the writer. (Tr. pp. 14 and 15).

On the averments of the information and answer the case was submitted for determination. The respondents were adjudged in contempt and a fine of six hundred seventeen and 95-100 dollars ($617.95), exclusive of costs, was imposed.

SPECIFICATION OF ERRORS.

I.

The court erred in finding that the publication of the article under consideration constituted contempt.

II.

The court erred in adjudging Mr. Campbell, the editor and manager, in contempt.

III.

The court erred in considering the costs incurred in the criminal case, and including same in the judgment which was rendered.

ARGUMENT.

The District Courts of the United States were created under the authority given Congress by that part of Section 1, Article 3 of the Constitution, which provides that:

> "The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish."

And also by that part of Section 8, Article 1, which provides that Congress shall have power "to constitute tribunals inferior to the Supreme Court".

By the Act of March 2, 1831, which was retained without substantial change in the act of March 3, 1911, known as the Judicial Code and being section 268 thereof, it is provided:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided* that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the said courts."

At the time of its passage, and for many years thereafter, the purpose and effect of the Act of 1831 were understood and accepted by judges who were familiar with the controversies that occasioned its enactment and its plain provisions were enforced. Recently, a tendency has been exhibited by some judges to construe away what seems to be the very clear and explicit language of the Act and to construe as contempt conduct necessarily not so according to its express provisions.

Prior to the impeachment of Judge Peck, whose acquittal was followed by the Act of 1831, the question of the power of courts to punish summarily as contempts newspaper publications does not appear to have been agitated except in the state of Pennsylvania. Two reported cases (Respublica vs. Oswald, 1 Dallas, 318, in the Supreme Court of Pennsylvania, and Hollingsworth vs. Duane, 6615 Federal cases in the United States Circuit Court for Pennsylvania), promulgated the doctrine that the courts in the United States had a common law power to punish in such cases, and held that the constitutional guarantee of trial by jury had no application. The judges in the cases referred to erroneously supposed that by the common law, courts of record in England possessed this power, whereas in truth, it had never been so held, except as to the courts constituting the Aula Regis, and in respect to them, on the theory that the sovereign personally dispensed justice.

Reg. v. LeFroy, L. R. 8 Q. B. 134.

Oswald on Contempt, 3rd ed., page 3, citing 3 Holdsworth, History of English Law, 312, says:

> "In early times, contempt, even in the face of the court was proceeded against by indictment or other ordinary process, but not summarily."

Referring to the ancient dictum of Wilmot J. in Sparks v. Martyn, (1669), 1 Vent. 1, that

> "It is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt of the court, acted in the face if it",

Oswald says, at page 134:

> This appears in fact not to have been the case, and the judgment in question will be found on examination to depend rather on a somewhat turbid rhetoric than on ratiocination or the examination of authorities."

However, the point that the power to punish summarily contempts out of court was at common law confined to the courts of the sovereign on the theory of his personal participation in their session was definitely settled in Reg v. LeFroy, L. R. 8 Q. B. 134 (1872). In that case, an attorney in a pending case before a county court, which was a court of record, published in a newspaper respecting a ruling of a judge, the following language:

> "The statement was a monstrosity, and, as I can now say without fear of an arbitrary or tyrannical abuse of power, an untruth."

In separate judgments by Chief Justice Cockburn and Judges Mellor ond Qain, upon a consideration of the old authorities, it was shown that contempts out of court were punishable in the Superior Courts at Westminster, including the courts of Queens Bench, Common Pleas and Exchequer, on the theory that such courts are divisions of the Aula Regis, "where it is said the King in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority for any contempt of the court would be a contempt of the sovereign."

But it was held that other courts of record created by Parliament and not supposed to be coeval with the foundation of the State itself, had never attempted to exercise any such authority.

In Respublica v.Oswald, 1 Dallas, 318, decided by the Supreme Court of Pennsylvania July 17, 1788, it appears that one Eleazer Oswald, a publisher at the city of Philadelphia of the Independent Gazateer, printed articles against the character of Andrew Brown, the master of a female academy in the city of Philadelphia, on account of which Brown brought an action for libel against Oswald in the Supreme Court of Philadelphia, and pending the action Oswald published articles in his newspaper, which, it was supposed, had a tendency to prejudice the public with respect to the merits of the cause. He was cited for contempt on a writ issued by Chief Justice McKean, who had been one of the signers of the Declaration of Independence, and was Governor

of Pennsylvania from 1799 until 1808. Mr. Lewis, appearing for the state, insisted that Oswald's address to the public manifestly tended to interrupt the course of justice; that it was an attempt to prejudice the minds of the people in a cause then pending, and by that means, to defeat the plaintiff's claim to justice, and to stigmatize the judges whose duty it was to administer the law.

Mr. Sargent, for the respondent, insisted that the court had no power to punish the defendant summarily; that he was entitled under the Ninth Section of the Bill of Rights of the State of Pennsylvania to a trial by jury. He said "Those contempts which are committed in the face of a court stand upon a very different ground. Even the court of *Admiralty,* (which is not a court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alleged to have been committed out of doors, are not within this reason; they come properly within the class of *criminal offenses;* and as such, by the 9th Sect. of the Bill of Rights, they can only be tried by a jury."

The court, however, held that:

> "It is a contempt punishable by attachment to publish remarks in a newspaper, which have a tendency to prejudice the public with respect to the merits of a cause depending in court."

and fined the respondent ten pounds and imprisoned him for one month.

After Oswald had paid his fine and served his term, he presented a memorial to the General Assembly of the State, giving a history of the proceedings against him, and complaining of the decision of the judges and of his imprisonment, and calling upon the United States to determine "whether the judges did not infringe the Constitution in direct terms in the sentence they had pronounced, and whether, of course, they had not made themselves proper objects of impeachment."

The Assembly appointed a committee on the order of procedure, and resolved itself into a committee of the whole, where it heard evidence on the memorial. After this Lewis, who had been counsel for the state in the court proceeding and was then a member of the House, in an elaborate argument, undertook the vindication of the judges. Mr. Findley, a member from Wesmoreland, followed Mr. Lewis, and commenting upon the judgment of the court, said:

> "That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense and understood the rules of grammar, was able to determine on a bare perusal of the bill of rights and constitution. With these aids, he defied all the sophistry of the schools and the jargon of the law to pervert or corrupt the explicit language of the text, and, therefore, be regretted that, in listening to the ingenuity of Mr. Lewis' paraphrase, his admiration was not necessarily followed by conviction".

Then after having discussed the 9th Section of the Bill of Rights, he said:

> "For outrages committed in the face of the court, for the misconduct of its officers, and for a disobedience or resistance of its process, there seemed, he said, to be a propriety in establishing an immediate remedy. But this did not extend, in his opinion, to the case of constructive contempts; to criminal offenses perpetrated out of the view of the court; nor to such acts as in their nautre did not call for a sudden punishment, and which, in their operation, involved a variety of facts that a jury was only competent to investigate and determine."

The judges escaped impeachment by a vote of fifty-seven to twenty-three, and in 1797, Judge McKean who held extreme views on the subject generally, bound over Cobbett, who was then publisher of a paper in Philadelphia on a charge of seditious libel against the King of Spain, but the grand jury returned no bill.

The attempt of Oswald to have the judges impeached failed, but the controversy continued. McKean was thrice elected Governor of the State, and by his strong influence defeated many attempts to limit the authority of the courts to punish contempts by summary process.

In 1804, one Thomas Passmore was attached and fined for contempt by Chief Justice Shippen for the publication in a tavern in Philadelphia of a statement that a party to a case pending before the court had committed perjury.

Respublica v. Passmore, 3 Yeates, 441.

Passmore complained to the Legislature against the Chief Justice and two associate justices, which resulted in an impeachment by the House of Representatives and a trial by the Senate. In January, 1805, the Senate voted thirteen guilty and eleven not guilty, the proceedings failing for lack of the required two-thirds majority.

The struggle, for freedom to publish comments on judicial proceedings, without being subjected to summary penalties was continued in Pennsylvania after the institution of the Federal Courts; the judges taking the position that the ruling in Res-Publica established their authority.

In Hollingsworth v. Duane, Federal Cases 6615 (May 18, 1801), Hollingsworth brought an action for libel against Duane, the publisher of the Aurora, a newspaper in Philadelphia. The declaration stated plaintiff to be a citizen of the United States, and defendant an alien. Defendant by plea in abatement claimed that the court had no jurisdiction, because he was a citizen of Pennsylvania. This point was tried by jury, and the jury found defendant to be an alien. While the case was still pending defendant in the issue of his newspaper of May 20, 1801, published an article attacking the court.

In Hollingsworth vs. Duane, Federal Cases 6615, an attachment was issued against Duane. Lewis, who had been counsel in Res Publica, cited English cases as precedents for the power to attach sum-

marily for cases in contempt. Among others he referred to the case of Rakes, an attorney, who was held in contempt for printing his brief before the case came on to be tried, in which Lord Hardwicke said:

> "The offense did not consist in the printing, for a man may give a printed as well as a written brief to counsel, but the contempt to this court was, prejudicing the world with respect to the merits of the case before it was heard."

Lewis in argument also referred to Oswald's case, and the acquittal of Judge McKean by the Legislature in 1798. Dickerson for defendant, contending that the power to punish summarily for contempts out of court without a jury must be looked upon as the exercise of a jurisdiction unfriendly to liberty, dangerous to the citizen, and easily capable of being perverted to the most odious purpose. He also conteded, as had been conteded in the Oswald case, that the exercise of such power was in violation of the Constitution of the United States. Judge Griffith referring to the English cases said that for contempts of inferior jurisdiction not of record, unless same are in the face of the court, there is no other method than by indictment, but Respublica vs. Oswald was held to be the law, and defendant was punished for contempt.

The same point was affirmed in United States vs. Duane, Federal Cases, 14997 (May 22, 1801), where in passing judgment on Duane, Chief Justice Tilghman held that the Constitution of the United States

did not guarantee trial by jury in contempt cases, saying:

> "It was determined very solemnly in the Supreme Court of Pennsylvania in the case of Commonwealth v. Oswald,. The present Governor of Pennsylvania was then Chief Justice. He is well versed in the general principles of law, as well as the usages and customs of the United States, and cannot be supposed to have favored construction unfriendly to true liberty, or unwarranted by the genuine sense of the Constitution. The principles established in the Oswald case are too strongly founded to be shaken, and I can say with certainty that for the last seven years they have been considered and acted upon as the law of Pennsylvania. The statutes of the United States expressly give to their courts the power of punishing contempts by fine or imprisonment at their discreation, and whoever attends to the expressions of those statutes will easily perceive that they recognize a summary mode of proceeding."

In 1809 after the death of Governor McKean, the Pennsylvania Legislature, in pursuance of a strong public demand, enacted a statute relating to summary punishments for contempt, which is still in force, and which provides:

> "The power of the several courts of this commonwealth to issue attachments and to inflict summary punishment for contempts of court shall be destricted to the following cases, to-wit:
>
> 1. To the official misconduct of the officers of such courts respectively;

2. To disobedience or neglect by officers, parties, jurors or witnesses, of or to the lawful process of the court;

3. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

In addition to the foregoing, it was specifically provided that publications out of court shall not be made the basis of summary attachment and punishment.

The history of the controversy in Pennsylvania is found in the note to Respublica vs. Oswald, in 1 Dallas, 318, Respublica v. Passmore, 3 Yeates, 438, and "Constructive Contempt" by John M. Thomas, ex-judge of the Supreme Court of Missouri.

We refer at this length to the Pennsylvania cases, for it was in this state that the Act of 1831, under which this proceeding was instituted, was first considered and construed. Mr. Justice Baldwin to whose decisions reference will subsequently be made, was thoroughly conversant with the proceedings here referred to, and had distinctly in mind the evils which the changed legislation of 1831 was intended and designed to remove.

HISTORY OF THE ACT OF 1831.

After the enactment of the Pennsylvania statute and similar statutes in other states, the question remained at rest in so far as the United States Courts were concerned for more than twenty years. The specific occasion for the enactment of the Federal

statute was the acquittal, upon impeachment proceedings, of Judge Peck, a judge of the United States District Court of Missouri, who in the year 1825, issued an attachment in contempt against Lawless, an attorney, imprisoned and disbarred him for a period of eighteen months for printing a criticism upon the reasoning of the judge in a published opinion. Judge Peck was impeached by the House of Representatives by a vote of one hundred and twenty-three to forty-nine; was tried by the Senate and acquitted on January 31, 1831, by the narrow margin of twenty-two to twenty-one.

James Buchanan, afterwards President of the United States, who was one of the prosecutors on behalf of the United States, said in part in his speech:

> "I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim."

The day after Judge Peck's acquittal, Draper, a representative from Virginia, which state had long had a statute similar to the Pennsylvania statute, introduced in the House, this resolution:

> "RESOLVED That the Committee on the Judiciary be directed to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts by the United States."

On February 10, 1831, Buchanan, who was a

member of the House from Pennsylvania and familiar with the Oswald case and the statute of Pennsylvania, which had then been in force for twenty-two years, reported a bill from the Judiciary Committee, which, after amendment, was enacted March 2, 1831. In its original form with title it read as follows: (4 Statutes 487):

> "An act declaratory of the law concerning contempt of Court.
>
> "BE IT ENACTED etc. That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said court in their official transactions and the disobedience or resistance by any officer of the said courts in their official transactions and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree or command of the said courts."

The judgment in Oswald's case was not only vigorously attacked as unconstituitonal at the time, but was made the basis of the impeachment proceedings against Judge McKean. It was never acquiesced in in Pennsylvania, and although followed as law in the Duane cases, was repudiated as the law of Pennsylvania by the enactment of the statute of 1809.

The Peck case involved the attempt by a United States District Judge to punish summarily as contempt a publication referring to a case which had terminated, but it does not follow that Congress in enacting the Act of March 2, 1831, intended to confine the limitations of the statute to such cases. If that had been the intention, it could have been very easily expressed. It is rather to be presumed that Congress had in mind the controversy which had raged in Pennsylvania. Buchanan, who was a member of the House from that state and a member of the Committee on the Judiciary, undoubtedly, was familiar with the struggle against the arbitrary power of the judges which had ended with the enactment of the Pennsylvania statute in 1809. As one of the prosecutors of Peck before the Senate, he conteded that:

> "Our courts have no right to punish as for contempts, in a summary mode, libels, even in pending cases."
>
> (Gales and Seaton's Register of the Debates 1831, page 42).

Mr. McDuffie of South Carolina, one of the prosecutors on behalf of the House in his speech of December 20, 1831, said:

> "The correct principle then was this: The courts of the United States had no power to punish for contempt further than their own self preservation required. It was necessary that they should possess the power to protect themselves in the administration of justice; to

> prevent and punish direct outrages on the court; to prevent the judge from being driven from the bench, the jury from being assaulted, and the regular and fair administration of justice from being impeded.
>
> * * *
>
> "It must be aflagrant outrage in the face of the court to justify a summary punishment for contempt."

He also criticised most vigorously the attempt to import into the United States the theory of the court of England that they could punish for contempt summarily, upon the ground that "they were administering the King's justice were an emanation of his power, and that the same principle that protected the character and person of the King as sacred protected those of his judges in like manner."

CASES UNDER THE ACT OF 1831.

That the meaning of the law, which, in fact, upon its face presents no ambiguity, was clearly understood at the time of its enactment is shown by the first decision under it.

In Ex Parte Poulson, Federal Cases 11350 (Circuit Court for the Eastern District of Pa. 1835), decided by Mr. Justice Baldwin of the Supreme Court of the United States, a rule was directed to the editor of the American Daily Advertiser, to show cause in contempt for publishing an article concerning the plaintiff in a suit then pending, in which

plaintiff was described as a counterfeiter, and plaintiff's witnesses attacked. After condemning in the severest language, the publication as being calculated to produce the worst ffect upon the administration of justice, Mr. Justice Baldwin said:

> "The first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial or in any way pending before it."

After quoting the Act of 1831, he says:

> "The history of this Act, the time of its passage, its title and provisions must be considered together in order to ascertain its meaning and true construction. It was enacted shortly after the acquittal of Judge Peck of Missouri on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial, the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the Judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power both by the common law and the express terms of the Judiciary Act Section 17 (1 Stat. 83), as declared by the Supreme Court to protect their suitors by the process of attachment. With this distinct knowledge and recognition

of the existing law, it canot be doubted that the whole subject was within the view of the Legislature; nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary power of the courts should be exercised, and to confine it to the specified cases.

* * *

"It would ill become any court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power. It is not like a case where the right of property or personal liberty is intended to be affected by a law which the court would construe very strictly to save a right granted or seured by any former law; neither is it proper to arraign the wisdom or justice of a law to which a court is bound to submit; nor to make an effort to move in relation to a matter when there is an insuperable bar to any efficient action.

"The law prohibits the issuing of an attachment except in certain cases, of which the present is not one. It would, therefore, be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the Act of 1831 would show most conclusive cause. The court is disarmed in relation to the press. It can neither protect itself, nor its suitors. Libels may be published upon either without stint. The merits of a cause depending for trial or judgment

may be discussed at pleasure. Anything may be said to jurors through the press, the most wilful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity.

"With this limitation on the summary jurisdiction of the court and the want of any legal provision making it cognizable by indictment, we cannot say that the publication which is the ground of this motion, or any other is or can be any disturbance of the business of the court. The action of the press is noiseless, producing the same effects, far or near, it matters not. The business of the court is not interrupted. Judges and jurors can perform their functions on the bench and in the box by confining their attention to the law and evidence."

In

United States v. Holmes, Federal Cases 15853, decided by Mr. Justice Baldwin in 1842, the court on account of the sensational character of the testimony, announced that newspaper reporters would not be permitted to come within the bar of the court, except on condition of suspending publications until the trial was concluded. Mr. Justice Baldwin gave as a reason for issuing such order that:

"By an act of Congress passed some years since, the court has no longer the power to punish as for contempt the publication of testimony pending a trial before us."

Ex parte Bradley, 7 Wall. 364, (1868)

presents the following case:

Bradley was guilty of misbehavior before Mr. Justice Fisher, who was a Justice of the Supreme Court of the District of Columbia while holding a session of the criminal court of the District, and the Supreme Court of the District punished him by disbarment on account of his offensive conduct and language towards one of its members. The Supreme Court of the United States held that the criminal court was a separate court, and that the Supreme Court was without jurisdiction. Mr. Justice Nelson in delivering the opinion granting a writ of mandamus to restore Bradley to his membership of the bar said:

> "Under such circumstances and in this posture of the case, it is plain that no authority or power existed in the Supreme Court to punish for the contempt thus committed, even without reference to the Act of Congress of 1831, which in express terms restricts the power except for 'misbehavior in the presence of said courts' or so near thereto as to obstruct the administration of justice."

In 1872 or 3 former Justice Curtis, of the Supreme Court of the United States in his lectures before the Harvard Law School, after stating that the Act of 1831 was passed in consequence of what occurred in connection with the impeachment proceedings against Judge Peck, quoted the Act and said:

> "The common law authority of the courts as it has been exercised in England and in this

country and as it was exercised by Judge Peck in the case I spoke of extended much wider than this. It extended so far as to punish the editor of a newspaper for publishing an account of a trial while the trial was in progress, and there were many other cases to which this power to punish for contempt extended. It is now restricted either to the action of the court upon its own officers to prevent them from committing a breach of official duty or to cintempts as they are called in the presence of the court, or *so near to the court as to disturb its proceedings* or to some misconduct of a juror or other person who disobeys an order of the court. If a juror, for instance, or a witness, disobeys the order of the court to attend, a process of attachment will issue against him under the provisions of this statute, but *with the exception of these cases the courts of the United States have no power to punish for contempt.* (Curtis on Jurisdiction of the United States Courts, 2nd ed. 176)."

In

Ex parte Robinson, 19 Wall 505 (1873),

the opinion was delivered by Mr. Justice Field, who said:

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and vested with jurisdic-

tion over any subject, they became possessed of this power, but the power has been limited and defined by the Act of Congress of March 2, 1831. The Act in terms applies to all courts, whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may, perhaps, be a matter of doubt, but that it applies to the Circuit and District Courts, there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence or subsequent acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them the law, specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases. First, where there has been misbehavior of a person in the presence of the courts or so near thereto as to obstruct the administration of justice; Second, where there has been misbehavior of any officer of the courts in his official transactions, and third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order and decorum in their presence* to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

In

McCaully's case, 25 App. D. C. 404,

there was involved the corrupt solicitation of a juror in a pending cause by an attorney. It was held that the fact that the solicitation occurred away from the court after the jury had been permitted to disperse, did not deprive the court of jurisdiction. The court said that the juror is a part of the court wherever he is, and it was accordingly held that interference with a juror personally came within the statute. This cause came before the Supreme Court on a petition for a writ of certiorari In re McCaully, 198 U. S. 582.

In re Edawrd S. May, 1 Fed. 737, (1880),

the judge, afterwards Mr. Justice Brown, punished for contempt a juror who corruptly negotiated with the defendant in a pending criminal case as to the verdict which should be rendered. The distinct ground of the judgment was that the juror disobeyed the order of the court. The court after quoting the Act of Congress, made the following statement:

> "The Act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trial."

In

United States v. Anon, 21 Fed. 761, (1884),

where District Judge Hammond held that a party to a case could be punished for threatening an Ex-

aminer at the taking of testimony. It was said at page 768:

> "It is generally understood that the object of that statute which has been *substantially* enacted in Tennessee and other states was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the courts, their officers and proceedings as contempts, which tend to impair respect for the tribunal and thereby obstruct the administration of justice."

In

Ex parte Schulenberg, 25 Fed. 211, (1885),

petitioner, a citizen of Missouri, who came to Detroit to attend a trial in the federal court was served with a writ of garnishment from the state court, and thereupon applied to the federal court to set aside said process and restrain further proceedings. The first application was denied by Mr. Justice Matthews, and by Judge, afterwards Mr. Justice Brown. On the second application, Judge Brown delivering an opinion, stated:

> "The difficulty in this case, however, arises from the statutes of the United States, one of which inhibits injunctions to stay proceedings in any court of a state except in bankruptcy cases, and the other of which limits our jurisdiction in cases of contempt to misbehaviors of any person in the presence of the court, or so near thereto as to obstruct the administration of justice, * * *
>
> "Conceding that the service of the writ of

> garnishment was a contempt at common law, I doubt seriously whether it is misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. Clearly it falls within no other clause of Section 725. These words seem to me to refer rather to riotous or unseemly conduct in the court room or in such immediate proximity thereto as to interrupt the sessions of the court or the orderly conduct of business therein and not to embrace constructive contempts of its authority."

Savin, Petitioner, 131 U. S. 267,
and
Cuddy, Petitioner, 131 U. S. 280,

were both decided May 13, 1889, Mr. Justice Harlan delivering the unanimous opinion in each case.

Savin appealed from a judgment of the district court committing him to jail for contempt. The charge was that in the jury room of the court, being used for witnesses and also in the hallway he undertook to bribe witnesses not to testify against defendant in a pending criminal case. Mr. Justice Harlan after quoting in full the Act of March 2, 1831, held that although the offence stated was punishable by indictment that mode is not exclusive when a misbehavior is in the presence of the court or so near thereto as to obstruct the administration of justice. At page 276, he said: "The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified

cases, among which was misbehavior in the presence of the court or misbehavior so near thereto as to obstruct the administration of justice. At page 276 he said:

> "The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court or misbehavior so near thereto as to obstruct the administration of justice. Ex parte Robinson, 19 Wall. 505-511. And although the word 'summary' was, for some reason, not repeated in the present revision, which invests the courts of the United States with power 'to punish by fine or imprisonment at the discretion of the court, contempts of their authority' in certain cases defined in section 725, we do not doubt that the power to proceed summarily for contempt in those cases, remains, as under the Act of 1831, with those courts. It was, in effect so adjudged in Ex parte Terry above cited. The question then arises whether the facts recited in the final order in the district court as constituting the contempt, which facts must be taken in this collateral proceeding to be true make a case of misbehavior in the presence of that court, or misbehavior so near thereto as to obstract the administration of justice therein. There may be misbehavior in the presence of a court amounting to contempt that would not ordinarily be said to obstruct the administration of justice. So there may be misbehavior not in the immediate presence of the court, but outside of and in the vicinity of the

building in which the court is held, which on account of its disorderly character would actually interrupt the court being in session in the conduct of its business, and consequently obstruct the administration of justice."

And adding at page 278:

"We are of opinion that the conduct of the appellant as described in the final order of the district court was misbehavior in its presence, for which he was subject to be punished without indictment by, fine or imprisonment, at its discretion, as provided in section 725 of the Revised Statutes. And this view renders it unnecessary to consider whether, as argued, the words 'so near thereto as to obstruct the administration of justice' refer only to cases of misbehavior outside of the court room or in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court while in session as to actually interrupt the transaction of its business."

In the Cuddy case, petitioner had been convicted in a contempt proceeding of approaching and attempting to influence a prosepctive juror wnose name had been drawn and who had been sworn voir dire. An attempt was made to distinguish the case from the Savin case, on the ground that the record did not show that petitioner's act occurred in the court room or while the court was in session. At page 284, Mr. Justice Harlan said:

"But both the petition for habeas corpus and the record of the district court are silent as to the particular locality where the appellant

> approached McGavin, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case of United States v. Young. That which, according to the finding and judgment the appellant did, if done in the presence of the court, that is, in the place set apart for the use of the court, its officers, jurors and witnesses, was clearly a contempt punishable as provided in section 725 of the Revised Statutes by fine or imprisonment at the discretion of the court and without indictment. Ex parte Savin, ante, p. 150|"

After holding that the district court is presumed to act within its jurisdiction, the court held that as the record did not show a case within the jurisdiction of the court "it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here."

At page 286 it was said:

> "We do not mean to say that this presumption as to jurisdictional facts about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under section 725 of the Revised Statutes made him liable to fine or imprisonment at the discretion of the court, he would have been entitled to the writ, and upon proving such facts to have been discharged. Such evidence would not have contradicted the record, but he made no such allegation in his application, and so far as the record shows, no such proof."

In

Morse v. Montana Ore Pur. Co., 105 Fed. 337 (1900)

District Judge Knowles granted a new trial on the ground that there was undue influence exerted over the jury by objectionable newspaper publication, editorials and articles, which, in the language of the charge were "well calculated to arouse prejudice against the plaintiff in this cause", and were "written with a view to influencing in some way the determination of this cause." It was claimed that the plaintiff ought "to have had the parties publishing these articles brought into court and punished for contempt or ought to have applied to the court for a continuance of the cause on account of the prejudice created by them, and by a failure so to do, waived the right to present the question upon a petition for a new trial."

In overruling this objection, the judge said that "it was extremely doubtful as to the right of the plaintiff to ask that the publishers of this paper be brought into court and examined upon the charge of contempt." He referred to the statement of Mr. Justice Nelson in Ex parte Bradley, 7 Wall. 364, that the statute "in express terms restricts the power, except for misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice", and the statement of Mr. Justice Field in Ex parte Robinson, 19 Wall. 505, that the power "can only be exercised to insure

order and decorum in their presence", and said (page 347):

> "The Independent's publishers seemed to have been advised of the limited power of the court in this matter, for in the publication of that paper made immediately after Col. Sanders had called attention to its article, it refers to the fact that it had not brought its paper into court, or hawked it in the presence of the court."

In

Ex parte McLeod, 120 Fed. 130, (1903),

which was an attachment in contempt for assaulting a United States Commissioner in the performance of his official duties, no penalty was inflicted, although the court expressed the opinion that one could be inflicted. In the course of the opinion District Judge Jones said (page 137):

> "Congress intended by this statute to put an end to the power of any federal court to prevent by punishment, as for contempt criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice. The statute was drawn by Mr. Buchanan, one of the Managers of the impeachment, who afterwards became president. It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision, taken from a similar statute in Pennsylvania, had in mind anything more than to prevent the punishment, as for a contempt of exercises of the right of free speech and liberty of the press in criticising and denouncing judicial acts."

In

Cuyler v. At. & N. C. R. Co., 131 Fed. 95 (1904), a United States Judge appointed a receiver for the At. & North Carolina Railroad Company. Shortly thereafter and while the receiver, as an officer of the court was in charge of the railroad, Josephus Daniels published an editorial in his paper severaly criticising the court for appointing the receiver, and on an order to show cause, it appeared that divers other editorials reflecting on the official integrity of the court had been published in the same paper. A writ of habeas corpus to release Mr. Daniels from arrest was presented to Circuit Judge Pritchard. Judge Pritchard's opinion is a careful examination of the statute and authorities. He quotes from Kent's Commentaries as follows:—

> "That Act (1831) had withdrawn from the courts of the United States the common law power to protect their suitors, officers, witnesses and themselves against the libels of the press, however atrocious, and though published and circulated pending the very trial of the case."

Continuing Judge Pritchard says:

> "Under the judiciary Act of September 24, 1789, C. 20 § 17, Courts of the United States were given power to punish by fine or imprisonment at the discretion of the said court all contempts of authority in any cause or hearing before the same. The act of 1789 did not define or limit the power or authority of the Court of

the United States to inflict summary punishment in any cause or hearing before them. It was also silent as to any rules of procedure for determining what constituted contempt. As to what particular acts constituted contempt as well as the mode of procedure against the offender was to be determined in accordance with the established rules and principles of the common law with reference to existing conditions. Under this act, it was contended that the authority which the courts had to punish for contempt at their discretion had been greatly abused, and in order that the citizen might not be subjected to annoyance on account of the commission of acts not contemplated by the law, and that the freedom of the press, as well as the liberty of the individual might be preserved in the spirit guaranteed by the Constitution, Congress defined the limit to which the courts could go in such cases. Section 725 of the Revised Statutes is in the nature of a limitation of the power of the court to punish for contempt."

Continuing the discussion of Section 725, and applying its provisions to the case then before him, Judge Pritchard said:

"The record does not show that the alleged misbehavior of the petitioner was in the presence of the court, or so near thereto as to obstruct the administration of justice. Nor is there anything to show that the alleged misbehavior of petitioner interfered with the court or that it tended, in the slightest degree to disturb the orderly proceedings of the court. The inherent power of the court to punish for con-

> tempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore, it is only such acts as tend to interfere with the orderly proceedings of the court or with the due adminstration of justice, that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held and not so near thereto as to interfere with the proceeding of the court do not render the author liable. Any loud noise or other distrubance in the presence of the court or in the street or other place, so near thereto as to interfere with the orderly proceedings of the court would, undoubtedly, tend to obstruct the administration of justice, and under such circumstances, the court is empowered to summarily punish for contempt."

Judge Pritchard points out what he conceives to be a limitation upon the broad language used by Judge Brown in re May where he said:

> "The Act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

He states at page 99 that in his opinion "there may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper

containing such article to the jury or a member thereof during the progress of the trial for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be a misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice."

And this language of Judge Pritchard suggests the thought that Congress in the use of the word "misbehavior" intended that the Act itself should possess inherently an element of wrong-doing. In the instant case, there is absent any purpose of doing wrong, and the court so finds. The article was published as an item of news without intention that the case on trial should, in any manner, be affected by it. The word "misbehavior" necessarily contemplates intentional wilfulness, and misconduct. If Congress did not intend this, and intended that any act obstructing the administration of justice, it would so declare, and the word "misbehavior" would not be used.

The term "misbehavior" carires with it the element of wrongful intention.

Smith vs. Cutler, 25 Am. Dec. 580.

See, likewise,

Hutton v. Superior Court of San Francisco, 81 Pac. 409.

If misbehavior presupposes an intention to do wrong, then we submit the bare publication of the article in question as an item of news wlthout any

intention that it should in any way interfere with the pending case does not constitute contempt and the judgment cannot stand.

In the case of

Kirk et al vs. U. S. ex rel Todd, U. S. Attorney, 192 Fed. 273,

this court considered many of the cases to which reference is made in this brief, but that case, as in all of the other cases where parties have been adjudged in contempt under this Act of Congress, the act or acts of misbehavior complained of had in them the element of wrongfulness. Newspapers are published to furnish to the public items of news. It is not contended that the facts set forth in the article in question are not true. If they were published with the intention that they should reach the jurors, so as to affect the case on trial, such conduct would constitute misconduct and have in it the element of misbehavior which the statute requires.

The record affirmatively shows the entire absence of any such intent.

We insist, however, that there is no warrant for adjudging Mr. Campbell in contempt. He had nothing to do with the preparation or publication of the article in question. The averment of the answer is, and it stands uncontradicted, that he didn't know anything about its publication. While the Independent Publishing Company may be responsible for Mr. Campbell's acts, Mr. Campbell is not responsible for what the company does, unless he participates, in some way, in the doing of the act,

and the record affirmatively shows that with the publication of the article or with the circulation of the paper containing it, he had nothing whatever to do.

The contempt in this case, if it exists at all, is a criminal one, and the compensatory fine should not be imposed.

In the case of

> Gompers v. Buck Stove & Range Co., 221 U. S. 418,

the Supreme Court of the United States said that contempts were neither wholly civil, nor altogether criminal, and puoting from its language in the case of

> Bessette v. Conkey Co., 194 U. S. 329,

said:

> "It may not always be easy to classify a particular act as belonging to one of these two classes. It may partake of the characteristics of both."

It then declares unqualifiedly that if the proceeding is for civil contempt, the punishment is remedial and for the benefit of the complainant, but if it is for a criminal contempt, the sentence is punitive to vindicate the authority of the court.

> Gompers case, supra.

In re Nevitt, 117 Fed. 448, the distinction between the two classes of contempts is clearly and distinctly set forth as follows:

> "Proceedings for contempts are of two classes;—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce." (Citing cases).

The contempt here, if any, clearly is a criminal one, and the court erred in taking into consideration the costs which were incurred by the United States by reason of the continuance of the criminal case. As was stated by Judge Sanborn in the Nevitt case, supra:

> "A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment."

The appellants here weren't parties to the criminal prosecution, and the contempt, if any, committed by them was distinctively a criminal one, and the costs which were occasioned by the continuance

of the criminal case amounting to six hundred seventeen dollars ninety five cents, should not have been considered or included in the judgment.

The contempt treated as a criminal one is devoid of features of wrongfulness, so that the court would be justified in imposing only a nominal fine. Where the element of wrongdoing is wanting, the courts invariably feel satisfied with imposing a nominal fine and costs.

Merrimack River Sav. Bank v. Clay Center, 219 U. S. 526;

State v. Fredlock, 94 Am. St. Rep. 932;

In re Duncan, 65 S. E. 210;

In re Robinson, 53 Am. St. Rep. 596;

In re Chartz, 124 Am. St. Rep. 915;

Mc Quade v. Emmons, 38 N. J. Law, 397;

Vol. 4 Pl. & Pr., page 791.

The principle, if such it might be properly termed, is stated in Cyc. vol. 9, page 57, as follows:

> "Where a party is in contempt through a misapprehension of his duties, or where it results from a mistake, and a reasonable excuse is presented to the court, ordinarily the party will be discharged upon the payment of the costs and expenses of the proceeding."

We respectfully submit that in this case, there is no warrant for adjudging Mr. Campbell in contempt. We, likewise, insist that the publication of the article, with the circumstances attandant upon

its publication, is not covered by the Act of Congress defining contempts, and that if it is within the Act referred to, it was wrongful for the court to include the costs incurred by reason of the continuance of the criminal case.

Respectfully submitted,

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